

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutory provisions involved	2
Statement	5
Specification of errors to be urged	5
Summary of Argument	6
Argument:	
Sections 3115 and 3116 of the Internal Revenue Code clearly define a criminal offense	7
1. The plain statutory language	7
2. The consistent judicial construction	10
3. The supporting legislative history	15
Conclusion	17

CITATIONS

CASES:

<i>Adamson v. United States</i> , 296 Fed. 110	11
<i>Godette v. United States</i> , 199 F. 2d 331	11
<i>Helvering v. Mitchell</i> , 303 U.S. 391	9, 14
<i>Kent v. United States</i> , 157 F. 2d 1, certiorari denied, 329 U.S. 785	13-14
<i>Morgan v. United States</i> , 294 Fed. 82	11
<i>Page v. United States</i> , 278 Fed. 41, certiorari denied, 258 U.S. 627	10, 11
<i>Patrilo v. United States</i> , 7 F. 2d 804	11
<i>Reynolds v. United States</i> , 280 Fed. 1	11
<i>Shively v. United States</i> , (W.D.Va.) decided November 11, 1953	13
<i>Tritico v. United States</i> , 4 F. 2d 664	11
<i>United States v. Blair</i> , 97 F. Supp. 718	13
<i>United States v. Harvin</i> , 91 F. Supp. 249	12
<i>United States ex rel. Bilokumsky v. Tod</i> , 263 U.S. 149	14

STATUTES:

Fair Labor Standards Act, 52 Stat. 1060 (29 U.S.C. 215, 216):	
Section 15	9
Section 16(a)	9

	Page
Internal Revenue Code (53 Stat. 1):	
Section 2553	9
Section 2554	9
Section 2557(b)	10
Section 2803(f)	9
Section 2803(g)	9
Section 2806	9
Section 2810	9
Section 3115	2, 6, 7, 8, 9, 10, 12, 14, 15
Section 3116	4, 6, 7, 8, 9, 10, 12, 14, 15
Section 3159	9
Section 3321	9
Liquor Law Repeal and Enforcement Act (49 Stat. 872) ..	11
Section 8	12
Section 10	11, 12
National Prohibition Act of October 28, 1919 (41 Stat. 305):	
Section 25 of Title II	10, 11
Section 29 of Title II	10, 11
Section 15 of Title III	11
18 U.S.C. 43, 44, 544, 545, 548	9
19 U.S.C. 1460	9
21 U.S.C. 188g, 1	9
27 U.S.C.A. 39, 46	12
MISCELLANEOUS:	
79 Cong. Rec. 13409	16
Hearings before the Senate Committee on the Judiciary, 74th Cong., 1st Sess., on S. 3336, p. 11	15-16
H. Rep. 1601, 74th Cong., 1st Sess., pp. 1-2	11
S. Rep. 1330, 74th Cong., 1st Sess., pp. 1-2	11

In the Supreme Court of the United States

October Term, 1953

No. 500

UNITED STATES OF AMERICA, *Appellant*

v.

FLOYD DIXON

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 1-2) has not been reported.

JURISDICTION

The order of the District Court dismissing the indictment was entered on October 21, 1953 (R. 1-2). The United States filed its notice of appeal to this Court on November 19, 1953 (R. 2). Prob-

able jurisdiction was noted by this Court on January 11, 1954 (R. 6). The jurisdiction of this Court to review on direct appeal the order of the District Court dismissing an indictment, based on a construction of a statute upon which the indictment was founded, is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the statute on which the indictment was founded, providing in Section 3115 of the Internal Revenue Code that violation of "any of the provisions of this part" shall be punishable by fine and imprisonment, and providing in Section 3116 of the same part that it "shall be unlawful" to possess property "intended for use in violating the provisions of this part, or the internal-revenue laws," defines a criminal offense.

STATUTORY PROVISIONS INVOLVED

Sections 3115 and 3116 of the Internal Revenue Code (53 Stat. 1, 362, Title 26, United States Code) provide:

Sec. 3115. PENALTIES

(a) *Violations as to operation of plants or unlawful withdrawal of taxable alcohol.* Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this part and lawful regulations made thereunder, or whoever withdraws or at-

tempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this part or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding \$1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than \$100 nor more than \$10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the Commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation.

(b) *Violations in general.* Any person violating the provisions of this part or of any regulations issued thereunder, for which offense a special penalty is not prescribed, shall be liable to the penalty or penalties prescribed in subsection (a). It shall be the duty of the prosecuting officer to ascertain, in the case of every violation of this part or the regulations made thereunder, for which offense a special penalty is not prescribed, whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment.

(c) *Previous conviction.* If any act or offense is a violation of this part, and also of any other law in regard to the manufacture or taxation of, or traffic in, intoxicating liquor, a conviction for such act or offense under the one shall be a bar to prosecution therefor under the other.

Sec. 3116. FORFEITURES and SEIZURES

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U.S.C. Title 18, §§ 611-633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or pro-

ceeds, for violation of the internal-revenue laws.

STATEMENT

On September 9, 1953, an indictment in one count charging appellee with violation of Sections 3115 and 3116 of the Internal Revenue Code was returned in the United States District Court for the Northern District of Georgia. The indictment alleged that on or about May 4, 1953, appellee wilfully and knowingly possessed "800 pounds of sugar, two 50-gallon wood doubling barrels, one metal cap, one heater box and mash pipe, the same being property intended for use in the manufacture and production of non-tax-paid distilled spirits, in violation of the Internal Revenue Laws with respect to such distilled spirits * * *." (R.1.)

The District Court dismissed the indictment on the sole ground that Section 3116 is "preventative and remedial rather than criminal, and that it does not define a criminal offense * * *." (R. 1-2.) The case is here on a direct appeal under the Criminal Appeals Act, 18 U.S.C. 3731.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that the statutory provisions on which the indictment was founded do not define a criminal offense.
2. In dismissing the indictment.

SUMMARY OF ARGUMENT

Section 3115 provides specified penalties of fine or imprisonment, or both, for violation of "any of the provisions of this part." The "part" of the Internal Revenue Code in which Section 3115 appears also includes Section 3116, which provides that it shall be "unlawful" to possess property intended for use in violating the provisions of that part or the internal-revenue laws. On the face of the statute, therefore, it is clear that violation of Section 3116 is a criminal offense to which the penalties prescribed in Section 3115 are applicable.

There is nothing unusual in legislation which in one section makes certain acts unlawful and in another prescribes criminal penalties for such acts. Nor is it uncommon for Congress to provide both criminal and civil sanctions for the same unlawful conduct. Hence it is of no consequence here that Section 3116 also provides for forfeiture, in a civil proceeding, of property intended for use in violating the internal revenue laws.

The conclusion that Section 3115 makes violation of Section 3116 a criminal offense is confirmed by a uniform line of judicial decisions extending back to 1919, when the National Prohibition Act, containing substantially similar provisions, was enacted. This construction is also supported by the meager relevant materials in the legislative history.

ARGUMENT

SECTIONS 3115 AND 3116 OF THE INTERNAL REVENUE CODE CLEARLY DEFINE A CRIMINAL OFFENSE.

1. The Plain Statutory Language.

The indictment in this case was founded on Sections 3115 and 3116 of the Internal Revenue Code (*supra*, pp. 2-5), which appear in the Code under Subtitle B ("Miscellaneous Taxes"), Chapter 26 ("Liquor"), Subchapter C ("Industrial Alcohol"), Part II ("Industrial Alcohol Plants").

Section 3115, captioned "Penalties", provides in subsection (a) that "Whoever operates an industrial alcohol plant" illegally, etc., "or whoever otherwise violates any of the provisions of this part", shall be liable to specified penalties of fine and imprisonment. Subsection (b) of Section 3115, captioned "Violations in general", provides that "Any person violating the provisions of this part or of any regulation issued thereunder, for which offense a special penalty is not prescribed, shall be liable to the penalty or penalties prescribed in subsection (a). * * *"

The next succeeding section, also in Part II, is Section 3116, captioned "Forfeitures and Seizures", which provides: "It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. * * *"

The indictment here (R. 1) charged that appellee, in violation of Sections 3116 and 3115, "unlawfully, wilfully and knowingly" possessed certain specified articles of property (sugar, barrels, distilling equipment, etc.), "intended for use in the manufacture and production of non-tax-paid distilled spirits, in violation of the Internal Revenue Laws with respect to such distilled spirits * * *." The district court held, as the sole ground for dismissal of the indictment, that Section 3116 "is preventative and remedial rather than criminal, and that it does not define a criminal offense" (R. 2). This holding, it is respectfully submitted, is erroneous and contrary to the plain, unambiguous language of the statute.

If Section 3116 stood alone, there would be room for argument that the only sanction for the unlawful possession of property intended for use in violating the internal revenue laws is forfeiture and seizure. The fundamental error in the district court's ruling, however, is that it completely fails to take into account the explicit provision in Section 3115 (not mentioned in the opinion below, R. 1-2) that violation of "any of the provisions of this part" (which necessarily includes Section 3116) is a criminal offense punishable by specified criminal penalties of fine and imprisonment.

The fact that Section 3116 provides an additional remedy of forfeiture of the property does not negate the fact that the proscribed conduct

is declared "unlawful" by that section and hence is a violation of "the provisions of this part" punishable under Section 3115. It is a commonplace in the law that a criminal act can also result in forfeiture of the property involved. *Helvering v. Mitchell*, 303 U. S. 391, 399-400; *e.g.*, 18 U.S.C. 43, 44, 544, 545, 548; 19 U.S.C. 1460; 21 U.S.C. 188g, 1; 26 U.S.C. 2803(f),(g), 2806, 2810, 3159, 3321. Since violation of Section 3116 is made a crime by Section 3115, it is of no significance that the former section is captioned "Forfeitures and Seizures", particularly since the latter is headed "Penalties." Any possible contrary implication is precluded by the specific provision of Section 3116 that:

Nothing in this section shall in any manner limit or affect any criminal or forfeiture provisions of the internal-revenue laws, or of any other law.

The technique of legislative draftsmanship by which certain acts are made unlawful by one section of a statute and criminal penalties prescribed by another is, of course, not uncommon. Thus, Section 15 of the Fair Labor Standards Act (29 U.S.C. 215) makes it unlawful for any person to violate certain other sections of the Act, and Section 16(a) imposes a criminal penalty on any person wilfully violating Section 15. In the Internal Revenue Code itself, with respect to narcotics, Sections 2553 and 2554 make certain acts unlaw-

ful, the punishment for which is prescribed by Section 2557(b). The same pattern was followed in the National Prohibition Act (see *Page v. United States*, 278 Fed. 41, 44 (C.A. 9), certiorari denied, 258 U. S. 627), and has been carried over into the successor provisions of the Internal Revenue Code dealing with liquor.

2. The Consistent Judicial Construction.

The plain language of Sections 3115 and 3116 has apparently discouraged any past effort to litigate the contention that these provisions do not create a criminal offense. Except for the decision below, it has since 1919 been consistently held or assumed, both as to these sections and their substantially identical predecessors in the National Prohibition Act of 1919 and the Liquor Law Repeal and Enforcement Act of 1935,¹ that these pro-

¹ Section 29 of Title II of the National Prohibition Act of October 28, 1919, 41 Stat. 305, 316, provided:

* * * Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined * * * or be imprisoned * * *.

Section 25 of Title II (41 Stat. 315) provided:

It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in such liquor or property. A search warrant may issue * * *, and such liquor, the containers thereof, and such property

visions define a criminal offense. See *e.g.*, *Page v. United States*, 278 Fed. 41 (C.A. 9), certiorari denied, 258 U.S. 627; *Reynolds v. United States*, 280 Fed. 1 (C.A. 6); *Morgan v. United States*, 294 Fed. 82 (C.A. 4); *Adamson v. United States*, 296 Fed. 110 (C.A. 5); *Tritico v. United States*, 4 F. 2d 664 (C.A. 5); *Patrilo v. United States*, 7 F. 2d 804 (C.A. 8); *Godette v. United States*, 199 F. 2d 331 (C.A. 4). Although no detailed tabulation exists, at least hundreds of criminal prosecutions were successfully brought under Sections 25 and 29 of Title II of the National Prohibition Act.

so seized shall be subject to such disposition as the court may make thereof.

Cf. Section 15 of Title III (relating to industrial alcohol), 41 Stat. 321-322, which provided that:

* * * whoever otherwise violates any of the provisions of this title or of regulations lawfully made thereunder shall be liable * * * to a penalty [of fine and imprisonment.]

In 1935, following repeal of the Eighteenth Amendment, Congress enacted the Liquor Law Repeal and Enforcement Act, 49 Stat. 872, which was designed both to repeal the obsolete provisions of the National Prohibition Act and to supplement Title III of that Act, relating to industrial alcohol, with so much of the subsisting provisions of Title II as would be of assistance in administering and enforcing Title III. See H. Rep. 1601, 74th Cong., 1st Sess., pp. 1-2; S. Rep. 1330, 74th Cong., 1st Sess., pp. 1-2.

Section 10 of the Liquor Law Repeal and Enforcement Act (49 Stat. 875) provided:

Any person violating the provisions of this title or of any regulations issued thereunder, for which offense a special penalty is not prescribed, shall be liable to the

See, *e.g.*, cases collected in 27 U.S.C.A., secs. 39, 46.

In 1950, the contention urged here by appellee was raised, apparently for the first time, by a motion to dismiss a similar indictment in *United States v. Harvin*, 91 F. Supp. 249 (E.D. Va), and was squarely rejected. The district court there stated (at pp. 250-251):

In the opinion of the Court section 3116 should be construed as defining both a criminal offense and a forfeiture. Provisions for the two are independent and distinct, however. They are not inseparable, as are felony and forfeiture at common law, or as they were

penalty or penalties prescribed in section 15 of Title III of the National Prohibition Act. * * *

Section 8 of that Act (49 Stat. 874-875) provided:

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this title, or of Title III of the National Prohibition Act, or the internal-revenue laws, or regulations prescribed under such title or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue * * * for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. * * *

Sections 10 and 8 of the Liquor Law Repeal and Enforcement Act were incorporated in substance, without any material change in phraseology, in Sections 3115 and 3116, respectively, of the Internal Revenue Code enacted into law on February 10, 1939 (53 Stat. 1, 362). *Supra*, pp. 2-5.

made by the statute in *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746. The existence of the forfeiture clauses does not exclude or extinguish the existence of the criminal prohibition. * * *

The cases of *Kent v. U.S.*, 5 Cir., 157 F. 2d 1 and *U.S. v. Windle*, 8 Cir., 158 F. 2d 196, both supra, involved only proceedings for forfeiture. Obviously the proceedings in each of them invoked exclusively the civil, in rem steps authorized under 3116, and plainly the courts there were sound in their holdings that the constitutional safeguards of criminal trials were not applicable. They were dealing only with the civil impact of 3116. *U.S. v. Elliott Hall Farm*, D.C.N.J., 42 F. Supp. 235 was of the same character.

Similar contentions were also rejected in *United States v. Blair*, 97 F. Supp. 718 (E.D. Ky.), and *Shively v. United States* (W.D. Va.), decided November 11, 1953.²

Kent v. United States, 157 F. 2d 1 (C.A. 5), certiorari denied, 329 U.S. 785, upon which the district court in the instant case relied, is plainly not apposite here. That case involved a civil forfeiture proceeding under Section 3116, not a criminal prosecution under Section 3115. There the

² An appeal taken in the latter case was argued before the Court of Appeals for the Fourth Circuit on January 4, 1954.

claimant of the property failed to take the stand, and the question was whether the district court could, in the circumstances of the case, draw any adverse inferences from his failure to testify. The Court of Appeals held that the Fifth Amendment was inapplicable. The court stated:

This is not a criminal case but a civil case * * *. His silence may well count against him, as against any other civil litigant. * * * This is not such a [criminal] trial. Kent is not here charged with any crime or offense. This property is alleged to be forfeited under 26 U.S.C.A. Int. Rev. Code, § 3116, because "intended for use in violating the provisions * * * of the internal-revenue laws." * * * The seizure for forfeiture here is not in consequence of or in punishment for a crime, but to prevent one. The proceeding is preventive and remedial, rather than punitive or criminal.

Read in their context, the excerpts from the *Kent* opinion quoted by the district court here (R. 1-2) thus furnish no support for the decision below. That case holds only that a forfeiture proceeding under Section 3116 is remedial and civil in nature. Cf. *Helvering v. Mitchell*, 303 U.S. 391, 400-404; *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-155. It does not hold that conduct declared unlawful by Section 3116 is not a crime punishable under Section 3115.

3. The Supporting Legislative History.

In view of the plain language of the statute and the uniform judicial interpretation it has received, it would require the most persuasive kind of legislative history to raise even a doubt as to the question here presented. But we have been unable to find anything in the legislative history of Sections 3115 and 3116 which furnishes support for the district court's construction. On the contrary, such gleanings as may be gathered from the scanty legislative history point to the error of the decision below.

As has been shown, Sections 3115 and 3116 are derived from similar provisions in the National Prohibition Act of 1919 and the Liquor Law Repeal and Enforcement Act of 1935. (See p. 10, footnote 1, *supra*.) During the hearings on the latter act before the Senate Committee on the Judiciary, Mr. V. Simonton, a representative of the Treasury Department who had participated in the drafting of the bill, described the scope of Section 8 (predecessor to Section 3116) as follows:

Mr. Simonton: The old act read, in section 25:

"It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this title."

We have extended that to include the possession of liquor or property intended for use

in violating the provisions of title III of the National Prohibition Act and of the internal-revenue laws. For the first time we have proposed legislation condemning an attempt to violate the internal-revenue laws. At the present time it is not an *offense* against the United States to attempt to violate the internal-revenue laws. It is a conspiracy, of course, but an attempt to do so is not strictly a violation of the law. [Hearings, Sen. Committee on the Judiciary, 74th Cong., 1st Sess., on S. 3336, p. 11. Italics supplied.]

Similarly, on the floor of the Senate, Senator Ashurst, who was in charge of the legislation, stated: "One of the new features of the bill is that it *penalizes* the possession of illegal liquor or illegal apparatus which is intended to be used in violating any liquor law." (79 Cong. Rec. 13409; italics supplied.) This language aptly describes provisions for criminal penalties as well as civil forfeitures, and not merely the latter.

CONCLUSION

For the reasons stated, it is respectfully submitted that the indictment states an offense, and that the judgment of the district court dismissing the indictment should be reversed.

ROBERT L. STERN
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

PHILIP ELMAN,
*Special Assistant to the
Attorney General.*

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

February 1954.